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Settlement Class

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

**CARRIE COUSER,  
INDIVIDUALLY AND ON  
BEHALF OF ALL OTHERS  
SIMILARLY SITUATED**

**PLAINTIFF,**

**V.**

**COMENITY BANK,**

**DEFENDANT.**

**Case No.: 12-CV-02484-MMA-BGS**

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
PRELIMINARY APPROVAL  
OF CLASS ACTION  
SETTLEMENT AND  
CERTIFICATION OF  
SETTLEMENT CLASS**

**DATE:** October 6, 2014

**TIME:** 2:30 p.m.

**CRTRM:** 3A

**JUDGE:** Hon. Michael M. Anello

[Declaration of Joshua B. Swigart;  
Declaration of Abbas  
Kazerounian; Declaration of Todd  
M. Friedman; Declaration of  
Carrier Couser; Declaration of  
Patrick M. Passarella.]

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1 **I. INTRODUCTION**

2 Plaintiff Carrie Couser (“Plaintiff”) submits this motion for preliminary  
3 approval of a proposed class action settlement (the “Settlement”) of this action (the  
4 “Action”), which is unopposed by Defendant Comenity Bank (“Defendant”).<sup>1</sup> The  
5 terms of the Settlement are set forth in the Settlement Agreement and Release  
6 (hereinafter the “Agreement” or “Agr.”) filed as Exhibit 1 to the Declaration of  
7 Abbas Kazerounian In Support of Preliminary Approval of Class Action  
8 Settlement and Certification of Settlement Class (“Kazerounian Decl.”).<sup>2</sup>

9 The proposed Settlement provides for a substantial financial benefit of  
10 \$8,475,000.00 to the approximately 4.3 to 4.4 million Settlement Class Members.  
11 Agr. §§ 2.20, 5.01, 8.02.<sup>3</sup> The \$8,475,000.00 Settlement Fund to be paid by  
12 Comenity Bank is an “all-in, non-reversionary payment.” *Id.* at § 2.20. After the  
13 Settlement Costs are deducted from the Settlement Fund, the amounts remaining  
14 will be available to pay all Approved Claims. *Id.* at §§ 2.20, 5.01-5.02. Each Class  
15 Member who timely submits an approved claim will receive a pro rata award from  
16 the Claims Fund dependent upon the total number of approved claims. *Id.* at §  
17 5.02. In return for payment of the Settlement Fund, Plaintiff, on behalf of the  
18 proposed Settlement Class, will dismiss the action and the Settlement Class will  
19 unconditionally release and discharge Defendant and other related Released Parties  
20 from all claims relating to the action. *Id.* at § 16.01.

21 While Plaintiff is confident of a favorable determination on the merits,  
22 Plaintiff has determined that the proposed Settlement provides significant benefits  
23 to the Settlement Class Members and is in the best interests of the Settlement Class  
24 members *Id.* at §§ 3.02 and 3.03; Declaration of Joshua B. Swigart (“Swigart  
25

26 <sup>1</sup> Plaintiff and Defendant are collectively referred to as the “Parties.”

27 <sup>2</sup> Unless otherwise specified, defined terms used in this memorandum are intended to  
28 have the meaning ascribed to those terms in the Agreement.

<sup>3</sup> Exhibit 3 (Response to Confirmatory Discovery: Interrogatory No. 1). All Exhibits  
are to the declaration of Abbas Kazerounian unless otherwise stated.

Decl”), ¶ 37; *see* Declaration of Carrie Couser (“Couser Decl.”), ¶ 4 and 10. Plaintiff also believes that the Settlement is appropriate because Plaintiff recognizes the expense and amount of time required to continue to pursue the Action, as well as the uncertainty, risk, and difficulties of proof inherent in prosecuting such claims. Swigart Decl., ¶¶ 36-38; Couser Decl., ¶ 4; Agr. § 3.03. Similarly, as evidenced by the Agreement, Comenity Bank has stated that although it has substantial and meritorious defenses to Plaintiff’s claims, it has determined that it is desirable to settle the Action as set forth in the Agreement. *Id.* at § 3.01.

Accordingly, Plaintiff moves the Court for an order preliminarily approving the proposed Settlement, provisionally certifying the Class pursuant to Federal Rule of Civil Procedure 23(b)(3) (“Rule 23(b)(3)”) for settlement purposes, directing dissemination of class notice, and scheduling a final approval hearing. The motion is unopposed by Defendant. *Id.* at § 3.01; *see also* § 1.02. A proposed Preliminary Approval Order and Final Approval Order is filed as Exhibit D and E, respectively, to the Agreement (Agreement is Exhibit 1 to the Kazerounian Decl.). The proposed Settlement satisfies all of the criteria for preliminary approval.

## II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Comenity Bank provides bank account servicing, collection and related services. Compl., ¶ 5. In her Complaint, Plaintiff alleged that in its collection efforts, Comenity Bank violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., (“TCPA”) by calling the cellular telephones of account-holders without “prior express consent,” using an “automatic telephone dialing system”<sup>4</sup> and/or using an “artificial or prerecorded voice”. Compl., ¶¶ 9-15. Plaintiff contends that she and the proposed class are entitled to statutory damages pursuant to the TCPA in the amount of \$500 per unlawful call. *Id.* at ¶ 29.

<sup>4</sup> *See* Exhibit 2 ( Deposition of Daniel Gervais (“Gervais Depo.”), 69:23-70:12, the calls at issue were all debt collection calls placed through Comenity Bank’s dialer). Mr. Gervias testified as the Fed. R. Civ. P. 30(b)(6) representative for Comenity Bank. *Id.* at 68:1-7.

Comenity Bank has denied and continues to deny that it violated the TCPA, and denies all charges of wrongdoing or liability against it in the Action. Agr. § 1.02; Dkt. No. 4.

In February of 2013, counsel for the Parties attended a telephonic Early Neutral Evaluation Conference presided over by Magistrate Judge Bernard G. Skomal (Dkt. No. 9). With Judge Skomal's guidance, progress was made toward informally determining the parameters of the Class, the number of calls made to persons on cellular phones during the proposed Class period, and consequently the range of potential damages. Agr. § 1.03.

After many months of good-faith negotiations, and three mediation sessions with the Honorable Judge Leo Papas (Ret.), the parties were eventually able to agree on the terms of a settlement agreement. Kazerounian Decl., ¶¶ 6-9; Agr. §§ 1.03 and 1.04. Plaintiff then conducted confirmatory discovery (including written discovery, and a Fed. R. Civ. P. 30(b)(6) deposition taken on August 21, 2014), confirming the total number of cell phones called, the efficacy of the processes and methodology used by Comenity Bank to assemble the data, and determining the estimated number of class members. Kazerounian Decl., ¶¶ 10-11. The parties had also conducted informal and formal discovery surrounding Plaintiff's claims and Defendant's defenses. Agr. 1.03; Kazerounian Decl., ¶ 12.

### **III. THE SETTLEMENT**

#### **A. THE SETTLEMENT CLASS**

The "Class" or "Settlement Class Members" means the persons in the following definition in the Agreement:

All persons whose cellular telephone number's were called by Defendant, released parties, or a third party dialing company on behalf of Defendant or the released parties, using an automatic telephone dialing system and/or an artificial or prerecorded voice, without consent, from August 1, 2010 through May 26, 2014, excluding those persons whose cellular telephone number/s were

marked with a “wrong number” code in Defendant’s database (which persons are included in the putative class in *Picchi v. World Financial Network Bank, et al.*, Case No.: 11-CV-61797, currently pending in the Southern District of Florida.)

Agr. § 2.08.

Excluded from the Class is Defendant, its parent companies, affiliates or subsidiaries, or any employees thereof, and any entities in which any of such companies has a controlling interest; the judge or magistrate judge to whom the Action is assigned; and, any member of those judges’ staffs and immediate families, as well as persons who validly request exclusion from the Settlement Class. *Id.*

The “Class Period” is the period of time during which Defendant is alleged to have placed the unlawful telephone calls via an automatic telephone dialing system, ranging from August 1, 2010 through May 26, 2014. *Id.* The Class List consists of Class Members’ cell phone numbers prepared by Defendant and provided as part of the settlement process to the Claims Administrator and Class Counsel. *Id.* at § 2.09.

The Class consists of approximately 4.3 to 4.4 million persons, and is not expected to exceed 4.4 millions persons. *Id.* at § 8.02; Gervais Depo., 71:1-72:2; 72:15-25. The exact number of class members is unknown because Comenity Bank had to recreate data for calls prior to September 2012 (*see* Gervais Depo., 73:9-76:25; Exhibit 3, Response to Interrogatory No. 4); however, the approximate number of Class Members is 4,322,812 with a 95% accuracy rate (*Id.* at 76:2-15; 87:19-88:3; *see also* 79:18-24; 80:7-82:15; Exhibit 3, Response to Interrogatory Nos. 2 and 3). Upon receiving notification from the Claims Administrator (Kurtzman Carlson Consultants or “KCC”), each Settlement Class Member who does not timely and validly request exclusion from the Settlement shall be entitled to make only one claim per cellular telephone number called, regardless of the

1 number of calls received by each cellular telephone number. *Id.* at § 10.01.

2 **B. SETTLEMENT PAYMENT**

3 Under the Settlement, Comenity Bank agrees to establish a Settlement Fund  
4 in an amount of \$8,475,000.00. Agr. § 5.01. The \$8,475,000.00 Settlement Fund is  
5 an “all-in, non-reversionary payment.” *Id.* at § 2.20. That is the maximum amount  
6 payable by Defendant in the Settlement of this Action. *Id.* at § 2.19. This  
7 Settlement Fund will include funds to pay the Settlement Costs. *Id.* at §§ 2.30 and  
8 5.01. This maximum payment is not subject to the number of claims made and  
9 approved (“Approved Claims”) and is not a reversionary fund.

10 **1. MONETARY AWARD TO CLASS MEMBERS**

11 All of the approximately 4.3 million persons associated with the Class are  
12 Settlement Class Members, and all are entitled to a pro rata award for their claims,  
13 the amount of which depends only upon the amount of Approved Claims, the  
14 Settlement Costs and the resulting Claims Fund. *Id.* at § 8.02. All approved claims  
15 will be awarded an equal share of the Claims Fund. *Id.* at § 5.02. The Settlement  
16 Class Members have a long time period in which to file claims, which is seventy-  
17 five (75) days from the date the direct mail Notice postcards are mailed. *Id.* at §§  
18 2.05 and 2.06.

19 The Claims process is as simple as the parties can make it. There are three  
20 ways a Settlement Class Member may submit a claim: (1) by calling the toll-free  
21 number that will be set up by the Claims Administrator; (2) by submitting a claim  
22 online at the settlement website; or (3) by submitting a claim form by mail to the  
23 Claims Administrator. *Id.* at 10.02. If the Settlement Class Member receives a  
24 postcard notice with a Claim Identification Number, that number should be  
25 provided to the Claims Administrator when making a claim. *Id.* at § 10.03.

26 Each Settlement Class member must provide the following to submit a  
27 claim: (i) claimant’s name, (ii) Claim Identification Number (if a post card notice  
28 was received); (iii) the cellular telephone number called by Comenity Bank; (iv)

1 and a mailing address for the settlement check, if different from the address on the  
2 postcard notice. *Id.*

3 If the claimant's name and/or cellular telephone number matches the Notice  
4 Database or Class List generated from Defendant's records, that claim will be  
5 approved, subject to the limitation that only one claim will be paid to each  
6 Settlement Class Member. *Id.* at § 10.03. If a Settlement Class Member submits a  
7 claim and qualifies for a monetary payment, he or she is a Qualified Class  
8 Member. *Id.*

## 9 **2. NON-MONETARY AWARD TO CLASS MEMBERS**

10 All Class Members will also benefit from the deterrent effect of this TCPA  
11 Settlement. *See Lo v. Oxnard European Motors, LLC*, 2012 WL 1932283, \*5 (S.D.  
12 Cal., May 29, 2012).

### 13 **C. CLASS NOTICE**

14 Notice will be given to the Class by direct mail, a question & answer notice  
15 on the settlement website, and by national publication. Agr. §§ 9.01-9.05.

#### 16 **1. Direct Mail Notice**

17 Even though the expense of such notice is considerable, the Agreement  
18 provides that notice of the proposed Settlement will be mailed by the proposed  
19 Claims Administrator, KCC, to Class Members by direct mail postcard notice  
20 ("Direct Mail Notice") to all of the estimated 4.3 million persons (*Id.* at § 8.02;  
21 Gervais Depo., 70:20-25; 76:23-77:2; 87:19-88:3) in the Class. Agr. §§ 9.01 and  
22 9.02; *see* Agreement, Ex. B (Direct Mail Notice). This Direct Mail Notice postcard  
23 summarizes the Settlement, provides instruction on how to make a claim and opt  
24 out or object, and directs the recipient to a toll-free telephone number and the  
25 Settlement Website, where the recipient may learn the details of the Settlement.  
26 Exhibit A; *see* Kazerounian Decl., ¶ 16.

27 In order to mail the Direct Mail Notice, Comenity Bank will provide the  
28 Claims Administrator with relevant records, listing the last known addresses of the



1 approximately 4.3 million Settlement Class Members (“Notice Database”). Agr. §  
 2 8.02. However, the Claims Administrator may check each address against the U.S.  
 3 Post Office’s National Change of Address Database to confirm the address prior to  
 4 the initial mailing. Further, the Claims Administrator will use its best efforts to  
 5 update any address for whom the mail is returned as undeliverable and re-mail the  
 6 Notice. *Id.* at §§ 9.01 and 9.02. Comenity Bank does not have address information  
 7 for 8,497 Class Members, which is less than 1%. *See* Kazrounian Decl., ¶ 31.

## 8 **2. Q & A Notice On Settlement Website**

9 A Settlement Website will be established to answer questions about the  
 10 Settlement, to allow the filing of claims and to allow anyone to review the  
 11 important documents relating to the Settlement, including but not limited to the  
 12 Settlement Agreement and Exhibits, the Court’s Orders, briefs requesting  
 13 attorneys’ fees and costs, and the motion for Final Approval of the Settlement.  
 14 Agr. §§ 9.04-9.05. The long-form Question & Answer Notice form notice (“Q &  
 15 A Notice”) will be made available on the Settlement Website. *Id.* at § 9.05;  
 16 Exhibit C; *see* Kazerounian Decl., ¶¶ 13 and 17.

## 17 **3. Publication Notice**

18 To provide additional notice to the Class Members, including the small  
 19 number for whom there are no names and addresses, the Parties intend to publish  
 20 notice of the Settlement in the national publication USA Today. Agr. § 9.03; *see*  
 21 Kazerounian Decl., ¶ 13. That notice will summarize the Settlement, advise the  
 22 Class Members how to file claims and direct Class Members to the Settlement  
 23 Website for further information about the Settlement. Agr. § 9.03, Exhibit C to  
 24 Settlement Agreement; Kazerounian Decl., 32.

## 25 **4. Toll-Free Number**

26 The Toll-Free Number and the Settlement Website will permit Class  
 27 Members to obtain information and a copy of the Agreement. Agr. §§ 9.05 and 9.06.

28 ///

**D. SCOPE OF RELEASE**

The scope of the release by all Class Members, other than those who exclude themselves from the Settlement, tracks the scope of Plaintiff's allegations in the original complaint relating to the prohibition against "the use of an 'automatic telephone dialing system' or an 'artificial or prerecorded voice'" as used in the TCPA. The release also covers known and unknown claims, including California Civil Code Section 1542 claims. *Id.* at §§ 16.01 through 16.03. The full release will be made available on the Settlement website at the end of the Q & A Notice. *See Id.* at § 9.04; Exhibit C (pp. 7-8).

**E. OPPORTUNITY TO OPT OUT AND OBJECT**

Under the terms of the proposed Settlement, Settlement Class Members will have the right to opt out of the Settlement or to object to its terms. Agr. §§ 12.01 and 12.02. The deadline for doing both is ten days after the end of the 75-day Claims Period. *Id.* at §§ 2.22 and 2.23. Settlement Class Members will be informed of these rights through the Direct Mail Notice, the Q & A Notice on the Settlement Website, the Publication Notice, and information available by calling the Toll-Free Number. *Id.* at §§ 9.01-9.06; Exhibits A, B, C.

**F. TERMINATION OF SETTLEMENT**

The Settlement may be terminated after providing written notice of his, their, or its election to do so ("Termination Notice"), to all other Parties hereto within ten (10) calendar days of any of the following occurrences:

- i. The Court rejects, materially modifies, materially amends or changes, or declines to preliminary or finally approve the Agreement;
- ii. An appellate court reverses the Final Approval Order, and the Agreement is not reinstated without material change by the Court on remand;
- iii. Any court incorporates into, or deletes or strikes from, or modifies, amends, or changes, the Preliminary Approval Order, Final Approval Order, or the Settlement Agreement in a way that Plaintiff or Defendant reasonably considers



1 material, unless such modification/amendment is accepted in writing by all Parties;

2 iv. The Effective Date does not occur; or

3 v. Any other ground for termination provided for elsewhere in this  
4 Agreement occurs. Agr. 17.01; *see also* Kazerounian Decl., ¶ 20.

5 If, at the conclusion of the Opt-Out Deadline, more than 3,000 of the  
6 Settlement Class Members have opted-out of the Settlement, the Defendant shall  
7 have, at its sole and absolute discretion, the option to terminate this Agreement  
8 within ten (10) days after the Opt-Out Deadline. Agr. §§ 17.01 and 17.02. If the  
9 Settlement is not finally approved by the Court or is materially modified in the  
10 course of approval proceedings, it will be void. *Id.* at §§ 17.01 through 17.03.

#### 11 **G. PAYMENT OF NOTICE AND ADMINISTRATIVE COSTS**

12 The Agreement provides that the estimated costs of Direct Mail Notice and  
13 establishing the claims administration procedures are to be deposited by Comenity  
14 Bank into the Settlement Fund Account administered by the Claims Administrator in  
15 trust within ten (10) days after entry of the Preliminary Approval order. *Id.* at §  
16 8.03. The funds necessary to fund the Settlement, including the Approved Claims  
17 and Settlement Costs, will be paid within ten (10) days of the Effective Date and  
18 subject to the terms of the Agreement. *Id.* at §§ 8.03 and 8.04. The Settlement Fund  
19 shall be maintained in an interest bearing account at Comenity Bank. *Id.* at § 8.04.

#### 20 **H. CLASS REPRESENTATIVE'S APPLICATION FOR INCENTIVE AWARD**

21 The proposed Settlement contemplates that Class Counsel will request an  
22 incentive award in the amount of \$1,500.00 to be distributed to the Class  
23 Representative, Carrie Couser, subject to Court approval, within five days of the  
24 Effective Date. *Id.* at § 6.02. Comenity Bank has agreed not to oppose a request  
25 for such incentive award in the agreed-upon amount. *Id.*

#### 26 **I. CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND COSTS**

27 The proposed Settlement contemplates that Class Counsel shall be entitled to  
28 apply to the Court for an award of attorneys' fees, costs, and expenses to be paid

1 from the Settlement Fund. *Id.* at § 6.01. Comenity Bank has agreed not to oppose  
 2 an application by Class Counsel for an award of attorneys' fees at the Ninth Circuit  
 3 Court of Appeals' benchmark of 25% of the Settlement Fund, *see Glass v. UBS*  
 4 *Financial Services, Inc.*, 331 Fed. Appx. 452, 457 (9th Cir. 2009). Agr. § 6.01.  
 5 Class Counsel also intends to request that other costs and expenses be paid from  
 6 the Settlement Fund. *See Id.* at § 8.03; Kazerounian Decl., ¶¶ 27-29. The costs  
 7 request will also include payment of any costs of Notice and Claims administration  
 8 (presently estimated by KCC to be at least \$2,092,278 because Direct Mail Notice  
 9 is required for approximately 4.3 million Class Members), but the final cost will  
 10 vary depending on a number of factors, including the number of claims submitted.  
 11 Agr. § 8.03; Declaration of Patrick Passarella ("Passarella Decl."), ¶ 8, filed  
 12 herewith. Class Counsel intend to also ask for costs of litigation not to exceed  
 13 \$25,000, to be paid from the Settlement Fund, which request is not opposed by  
 14 Defendant (Agr. § 6.01). Kazerounian Decl., ¶ 25(d); Swigart Decl., ¶ 25(d)

#### 15 **J. CY PRES DISTRIBUTION**

16 On the Final Distribution Date, which is the earlier of: (i) the date as of  
 17 which all the checks for the Settlement Awards have been cashed; or, (ii) two-  
 18 hundred ten (210) days after the date on which the last check for a Settlement  
 19 Award was issued, the Claims Administrator shall pay any amount remaining in  
 20 the Settlement Fund Account from uncashed Settlement checks to one or more *cy*  
 21 *pres* recipients which are agreed upon by the Parties and approved by the Court.  
 22 Agr. § 8.05(f). *See Vandervort v. Balboa Capital Corp.*, 2014 U.S. Dist. LEXIS  
 23 46174, \*6 (C.D. Cal. Mar. 27, 2014) (approving contingent *cy pres* distribution as  
 24 part of TCPA class action settlement).

#### 25 **IV. LEGAL STANDARDS FOR PRELIMINARY APPROVAL OF A CLASS ACTION** 26 **SETTLEMENT**

27 A class action may not be dismissed, compromised or settled without the  
 28 approval of the Court. Fed. R. Civ. Proc. 23(e). Judicial proceedings under

1 Rule 23 have led to a defined procedure and specific criteria for settlement  
2 approval in class action settlements, described in the Manual for Complex  
3 Litigation (Fourth) (Fed. Judicial Center 2004) (“Manual”) § 21.63, *et seq.*,  
4 including preliminary approval, dissemination of notice to class members, and a  
5 fairness hearing. Manual, §§ 21.632, 21.633, 21.634.

6 The purpose of the Court’s preliminary evaluation of the settlement is to  
7 determine whether it is within the “range of reasonableness,” and thus whether  
8 notice to the class of the terms and conditions of the settlement, and the scheduling  
9 of a formal fairness hearing, are worthwhile. *See* 4 Herbert B. Newberg, Newberg  
10 on Class Actions § 11.25 *et seq.*, and § 13.64 (4th ed. 2002 and Supp. 2004)  
11 (“Newberg”). The Court is not required to undertake an in-depth consideration of  
12 the relevant factors for final approval. Instead, the “judge must make a preliminary  
13 determination on the fairness, reasonableness, and adequacy of the settlement  
14 terms and must direct the preparation of notice of the certification, proposed  
15 settlement, and date of the final fairness hearing.” Manual, § 21.632 (4th ed. 2004).

#### 16 **A. Public Policy Favors Settlement**

17 As a matter of public policy, settlement is a strongly favored method for  
18 resolving disputes. *See Utility Reform Project v. Bonneville Power Admin.*, 869  
19 F.2d 437, 443 (9th Cir. 1989). This is especially true in class actions such as this.  
20 *See Officers for Justice v. Civil Service Comm’n*, 688 F.2d 615 (9th Cir. 1982). As  
21 a result, courts should exercise their discretion to approve settlements “in  
22 recognition of the policy encouraging settlement of disputed claims.” *In re*  
23 *Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).  
24 To make the preliminary fairness determination, courts may consider several  
25 relevant factors, including “the strength of the plaintiffs’ case; the risk, expense,  
26 complexity, and likely duration of further litigation; the risk of maintaining class  
27 action status through trial; the amount offered in settlement; the extent of discovery  
28 completed and the stage of the proceedings; [and] the experience and views of

1 counsel ... .” *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).  
 2 Furthermore, courts must give “proper deference to the private consensual decision  
 3 of the parties,” since “the court’s intrusion upon what is otherwise a private  
 4 consensual agreement negotiated between the parties to a lawsuit must be limited  
 5 to the extent necessary to reach a reasoned judgment that the agreement is not the  
 6 product of fraud or overreaching by, or collusion between, the negotiating parties,  
 7 and that the settlement, taken as a whole, is fair, reasonable and adequate to all  
 8 concerned.” *Id.* at 1027.

9 **B. Conclusions of Fact And Law Are Not Necessary At This Stage**

10 Preliminary approval does not require the Court to make a final  
 11 determination that the settlement is fair, reasonable, and adequate. Rather, that  
 12 decision is made only at the final approval stage, after notice of the settlement has  
 13 been given to the class members and they have had an opportunity to voice their  
 14 views of the settlement or to exclude themselves from the settlement. *See* 5 James  
 15 Wm. Moore, Moore’s Federal Practice – Civil § 23.165[3] (3d ed.). Thus, in  
 16 considering a potential settlement, the Court need not reach any ultimate  
 17 conclusions on the issues of fact and law, which underlie the merits of the dispute,  
 18 *West Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086 (2d Cir. 1971), and need not  
 19 engage in a trial on the merits, *Officers for Justice v. Civil Service Comm’n*, 688  
 20 F.2d at 625. Preliminary approval is merely the prerequisite to giving notice so  
 21 that “the proposed settlement ... may be submitted to members of the prospective  
 22 class for their acceptance or rejection.” *Philadelphia Hous. Auth. v. Am. Radiator*  
 23 *& Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970).

24 Preliminary approval of the settlement should be granted if there are no  
 25 “reservations about the settlement, such as unduly preferential treatment of class  
 26 representatives or segments of the class, inadequate compensation or harms to the  
 27 classes, the need for subclasses, or excessive compensation for attorneys.” Manual  
 28 for Complex Litigation § 21.632, at 321 (4th ed. 2004). This proposed settlement

1 satisfies those standards. Furthermore, the opinion of experienced counsel  
 2 supporting the settlement is entitled to considerable weight. *See, e.g., Kirkorian*  
 3 *v. Borelli*, 695 F. Supp. 446 (N.D. Cal.1988) (opinion of experienced counsel  
 4 carries significant weight in the court’s determination of the reasonableness of the  
 5 settlement); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979)  
 6 (recommendations of plaintiffs’ counsel should be given a presumption of  
 7 reasonableness).

### 8 **C. Counsel’s Experienced Judgment Holds Considerable Weight**

9 The decision to approve or reject a proposed settlement “is committed to the  
 10 sound discretion of the trial judge[.]” *See Hanlon*, 150 F.3d at 1026. This  
 11 discretion is to be exercised “in light of the strong judicial policy that favors  
 12 settlements, particularly where complex class action litigation is concerned,” which  
 13 minimizes substantial litigation expenses for both sides and conserves judicial  
 14 resources. *See Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238 (9th Cir.  
 15 1998) (quotations omitted).

16 Based on these standards, Plaintiff’s counsel respectfully submits that, for  
 17 the reasons detailed below, the Court should preliminarily approve the proposed  
 18 Settlement as fair, reasonable and adequate. This motion is not opposed by  
 19 Defendant. Agr. §§ 3.02; *see also* § 1.02; Kazerounian Decl., ¶¶ 3, 9 and 15.

## 20 **V. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND** 21 **SHOULD BE PRELIMINARILY APPROVED**

### 22 **A. LIABILITY IS HIGHLY CONTESTED AND BOTH SIDES FACE** 23 **SIGNIFICANT CHALLENGES IN LITIGATING THIS CASE**

24 Comenity Bank has vigorously contested the claims asserted by Plaintiff in  
 25 this Action. Agr. § 3.01; Answer (Dkt. No. 4). While both sides strongly believe in  
 26 the merits of their respective cases, there are risks to both sides in continuing the  
 27 Action. *See* Agr. §§ 3.01-3.03. Class Counsel understands there are uncertainties  
 28 associated with complex class action litigation and that no one can predict the  
 outcome of the case. Kazerounian Decl., ¶¶ 36-38. Nevertheless, Class Counsel is

confident that a class would be certified here, should the case proceed, even though Defendant vigorously contends that a class would not be certified. If the Action were to continue, challenges would likely be made to any class certification motion made by Plaintiff, thereby placing in doubt whether a class could be certified in the Action, and additional substantive challenges to the claims might be raised.

In considering the Settlement, Plaintiff and Class Counsel carefully balanced the risks of continuing to engage in protracted and contentious litigation against the benefits to the Class including the significant Settlement Fund and the deterrent effects it would have. Kazerounian Decl., ¶¶ 8, 36-38; Swigart Decl. ¶ 36-39; Couser Decl., ¶ 4; *see also* Agr. § 3.03. Similarly, Comenity Bank has to recognize that if a class is certified, the potential amount of damages could be substantially higher than the Settlement agreed upon here. The Settlement avoids that risk. Because of the costs and risks to both sides, and delays of continued litigation, the Settlement presents a fair and reasonable alternative to continuing to pursue the Litigation as a class action for the alleged violations of the TCPA.

This proposed settlement is unlike the requests for class certification that were denied in *Smith v. Microsoft Corp.*, 2014 U.S. Dist. LEXIS 12799 (S.D. Cal. 2014) and *Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574, 579 (S.D. Cal. 2013). In *Smith*, the defendant lacked call data for much of the period; however, Comenity Bank was able to recreate call data that was unavailable for the Class Period prior to September 2012. Gervais Depo., 73:9-76:2; 72:15-18. And, unlike *Connelly* where there were different methods to obtain prior express consent, Comenity Bank has eliminated the telephone numbers that were provided on its customer application, which means that consent is not an issue here. *Id.* at 85:1-25.

**B. THE AGREEMENT TO CREATE A \$8,475,000.00 SETTLEMENT FUND PROVIDES A FAIR AND SUBSTANTIAL CLASS BENEFIT**

As set forth above, Comenity Bank has agreed to pay \$8,475,000.00 to settle this Action. Agr. § 5.02. Class Members will be paid a pro rata amount for their



1 Approved Claims, with the amount paid for each claim dependent upon the total  
2 dollar amount of all Approved Claims and the amount of Settlement Costs deducted  
3 from the Settlement Fund. *Id.* at §§ 5.01-5.03; *see also* Kazerounian Decl., ¶¶ 23-25.

4 The settlement award that each Settlement Class Member will receive  
5 (estimated to be \$32.67 at a 3% claims rate<sup>5</sup>, or \$0.98 at a 100% claims rate) is fair,  
6 appropriate, and reasonable given the purposes of the TCPA and in light of the  
7 anticipated risk, expense, and uncertainty of continued litigation. *See* Exhibit 4  
8 (TCPA Settlement Matrix regarding claim rates). The purpose of the TCPA is to  
9 protect the privacy interests of residential telephone subscribers by placing  
10 restrictions on unsolicited, automated telephone calls. S. Rep. No. 102-178, at 6  
11 (1991), as reprinted in 1991 U.S.C.C.A.N. 1968, 1973.

12 Although the TCPA provides for statutory damages of \$500 for each  
13 negligent violation and \$1,500 for each willful violation, it is well-settled that a  
14 proposed settlement may be acceptable even though it amounts to only a small  
15 percentage of the potential recovery that might be available to the class members at  
16 trial. *See e.g., National Rural Tele. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527  
17 (C.D. Cal. 2004) (“well settled law that a proposed settlement may be acceptable  
18 even though it amounts to only a fraction of the potential recovery”); *In re Global*  
19 *Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 460 (E.D. Pa. 2000) (“the fact  
20 that a proposed settlement constitutes a relatively small percentage of the most  
21 optimistic estimate does not, in itself, weigh against the settlement; rather, the  
22 percentage should be considered in light of strength of the claims”); *In re*  
23 *Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036 (N.D. Cal. Jan. 9, 2008) (court-  
24 approved settlement amount that was just over 9% of the maximum potential  
25 recovery); *In re Mego Fin’l Corp. Sec. Litig.*, 213 F. 3d 454, 459 (9th Cir. 2000).

26  
27 <sup>5</sup> Settlement Fund (\$8,475,000) – Attorney Fees (25% of \$2,118,750 = \$6,356,250) –  
28 Costs (\$25,000) – Admin. Costs (\$2,092,278) – Incentive Payment (\$1,500) = Fund  
Remaining (\$4,237,472).  $4,237,472 / 129,684$  (3% claim rate) = \$32.67.

**C. THE SETTLEMENT WAS REACHED AS THE RESULT OF ARM'S LENGTH NEGOTIATION WITH THE COURT'S ASSISTANCE**

The proposed Settlement is the result of a series of spirited arm's length negotiations, including an Early Neutral Evaluation conference held before Magistrate Judge Bernard G. Skomal, followed by three days of mediation with and Hon. Leo S. Papas (Ret.) and further negotiations between the Parties. With the guidance of Hon. Leo S. Papas (Ret.), and Magistrate Judge Skomal, who assisted in the informal discovery procedures that permitted the Parties to facilitate this Settlement, and working independently of the Court, the Parties were able to reach a Settlement. *See* Agr. §§ 1.03-1.04; Kazerounian Decl., ¶¶ 6-9. Defendant provided Plaintiff with information concerning the claim, including data regarding the number of putative class member's called, and such information was analyzed by a third party expert engaged by Plaintiff. Agr. § 1.03; *see* Kazerounian Decl., ¶¶ 10-11.

Additionally, informal discovery was provided to Class Counsel and later, after settlement, confirmatory discovery was reviewed by Class Counsel. Kazerounian Decl., ¶¶ 11-12. Confirmatory discovery, including written discovery and a deposition pursuant to Fed. R. Civ. P. 30(b)(6)), verified the parameters of the broader Class and the number of cell phones called making up the number of Class Members. *See id.* With counsel for both sides also participating, there were several conference calls regarding methodology, databases used, technical details of database searches and other questions related to the parameters of the Settlement Class, and how the number of cell phones called was determined. *Id.* at ¶¶ 8-12; *see also* Gervais Depo., 73:9-76:21; 76:7-25; 80:7-82:15; 79:18-24. Plaintiff's counsel is satisfied the information provided about the number of persons in the Settlement Class and the number of cell phones called is correct (*see id.* at 79:1-17). Kazerounian Decl., ¶ 10.

Moreover, after reaching an agreement in principle during the mediations to settle the case, the Parties' counsel engaged in extensive discussions for several more months. These discussions were necessary to work out the many details of



the Settlement including: data production, total number of Class Members, the claims process and notice procedures. *See* Kazerounian Decl., ¶ 10; *see also* Gervais Depo., 73:9-76:21; 76:7-25; 80:7-82:15; 79:18-24. The time and effort spent on settlement negotiations, as well as the time spent with the retired judge in mediation, and obtaining the necessary data in the settlement process, militate in favor of preliminary approval of the proposed Settlement, as they strongly indicate there was no collusion. *See In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008) (“Settlements that follow sufficient discovery and genuine arms-length negotiation are presumed fair.”).

**D. EXPERIENCED COUNSEL HAVE DETERMINED THAT THE SETTLEMENT IS APPROPRIATE AND FAIR TO THE CLASS**

The Parties are represented by counsel experienced in complex class action litigation. Class Counsel has extensive experience in class actions, as well as particular expertise in class actions relating to consumer protection and specifically the TCPA. Kazerounian Decl., ¶¶ 41-54; Swigart Decl., ¶¶ 41-47; Declaration of Todd M. Friedman (“Friedman Decl.”), ¶¶ 41-45. Similarly, Counsel for Comenity Bank has extensive experience based upon a long track record in complex class actions (*see* [http://www.cmtlaw.com/david\\_j\\_kaminski.html](http://www.cmtlaw.com/david_j_kaminski.html)). They have vigorously defended Comenity Bank throughout this case. *See* Agr. § 3.01. Class Counsel believe that under the circumstances, the proposed Settlement is fair, reasonable and adequate and in the best interests of the Class Members. *See* Kazerounian Decl., ¶¶ 3, 15, 23-34, 37; Swigart Decl., ¶¶ 3 and 15; Friedman Decl. ¶¶ 3 and 15.

**E. THE COURT SHOULD PRELIMINARILY CERTIFY THE CLASS FOR PURPOSES OF SETTLEMENT**

Courts have long acknowledged the propriety of class certification for purposes of a class action settlement. *See In re Wireless Facilities*, 253 F.R.D. at 610 (“Parties may settle a class action before class certification and stipulate that a defined class be conditionally certified for settlement purposes”). Like any other class certification decision, certification of a class for settlement purposes requires a determination that the requirements of Rule 23 are met. *Id.* As explained below,

1 certification of a settlement class is appropriate here because the action meets the  
2 requirements of Rule 23(a) and Rule 23(b)(3).

### 3 **1. NUMEROSITY**

4 Class certification under Rule 23(a)(1) is appropriate where a class contains  
5 so many members that joinder of all would be impracticable. “Impracticability  
6 does not mean ‘impossibility,’ but only the difficulty or inconvenience of joining  
7 all members of the class.” *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d  
8 909, 913-14 (9th Cir. 1964) (citation omitted). Here, the Notice Database that will  
9 be used to provide notice to the Class contains information relating to  
10 approximately 4,322,812 individuals with unique cellular telephone numbers.  
11 Gervais Depo., 87:19-88:3; 70:1-72:2; 72:15-18. Thus, the proposed Class is  
12 sufficiently numerous for purposes of certifying a settlement class, as it would be  
13 impractical to maintain millions of nearly identical TCPA actions.

### 14 **2. COMMONALITY**

15 The commonality requirement is met if there are questions of law and fact  
16 common to the class. *Hanlon*, 150 F.3d at 1019 (“The existence of shared legal  
17 issues with divergent legal factual predicates is sufficient, as is a common core of  
18 salient facts coupled with disparate legal remedies within the class.”).

19 Here, for purposes of settlement, the proposed Class Members’ claims all  
20 stem from the same factual circumstances, specifically that debt collection calls  
21 were made or would be made by Comenity Bank to Class Members between  
22 August 1, 2010 and May 26, 2014 using autodialing equipment or with a  
23 prerecorded voice message. Compl., ¶¶ 10 and 14; Agr. § 2.08. Plaintiff’s claims  
24 also present a number of questions of law that are common to all members of the  
25 Class for settlement purposes, including: (1) whether Comenity Bank called  
26 “cellular”<sup>6</sup> telephone numbers; (2) using an ATDS or a prerecorded voice; (3)

27 \_\_\_\_\_  
28 <sup>6</sup> Comenity Bank hired a third party to scrub the list of telephone numbers for cell  
phone numbers only. See Gervais Depo., 77:21-25.

without the called party's "prior express consent"; (4) for debt collection purposes<sup>7</sup> (Compl., ¶ 21). *See Lemieux v. Schwan's Home Serv.*, 2013 U.S. Dist. LEXIS 98735, \*22 (S.D. Cal. July 15, 2013) ("The common question is thus, 'were we all called on our cellular telephones, by an autodialer or artificial or prerecorded voice, on behalf of [defendant], without having given express consent?'"). The Class Members all seek the same remedies, including statutory damages and injunctive relief. *Id.* at ¶¶ 26, 29-30. Under these circumstances, the commonality requirement is satisfied for purposes of certifying a settlement class. *See Hanlon*, 150 F.3d at 1019-20.

### 3. TYPICALITY

The typicality requirement is met if the claims of the named representatives are typical of those of the class, though "they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. For purposes of settlement, Plaintiff's claims are typical of the claims of the whole class because they arise from the same factual basis – debt collection calls made to Plaintiff using autodialing equipment – without prior express consent and are based on the same legal theory as applies to the Class as a whole – that the calls violated the TCPA (Compl., ¶ 22); Agr. § 2.08. *See Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987). Ms. Couser claims that Comenity Bank contacted her cellular telephone via an automatic telephone dialing system that used an artificial or prerecorded voice without her consent. Compl., ¶¶ 8-15. Accordingly, the Class Representative's claim is typical of those of the Settlement Class Members (*id.* at ¶ 22). Thus, the typicality requirement is satisfied for certifying a settlement class. *See Malta*, 2013 U.S. Dist. LEXIS 15731 at \*7 ("Plaintiffs' claims arise from the same factual basis as that of the class: calls made to Plaintiffs using auto-dialing equipment. ... In addition, plaintiffs' claims are based on the same legal theory as that applicable to the class").

///

<sup>7</sup> Only debt collection calls were placed using Comenity Bank's dialer during the relevant period. Gervais Depo., 69:23-70:12.

1                   **4.     ADEQUACY OF CLASS REPRESENTATIVE AND HER COUNSEL**

2           Rule 23(a)(4) is satisfied if “the representative parties will fairly and  
3 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The Court  
4 must measure the adequacy of representation by two standards: “(1) Do the  
5 representative plaintiffs and their counsel have any conflicts of interest with other  
6 class members, and (2) will the representative plaintiffs and their counsel prosecute  
7 the action vigorously on behalf of the class?” *In re Wireless Facilities*, 253 F.R.D.  
8 at 611 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 958 (9th Cir. 2003)).

9           Ms. Couser and her counsel have no conflicts of interest with other Class  
10 Members because, for purposes of the Settlement, Plaintiff’s claims are typical of  
11 those of other Class Members. *See* Couser Decl., ¶¶ 8; Kazerounian Decl., ¶¶ 34;  
12 Swigart Decl., ¶ 34. Ms. Couser and her counsel have been prosecuting this action  
13 vigorously on behalf of the Class, and have participated in three mediation  
14 sessions. Couser and her counsel share the common goal of protecting and  
15 improving consumer and privacy rights throughout the nation, and there is no  
16 conflict among them. *See* Couser Decl., ¶¶ 5-10; *see also* Kazerounian Decl., ¶ 15.  
17 Plaintiff’s counsel have extensive experience in litigation, including the  
18 prosecution of class actions seeking to protect privacy and consumer rights,  
19 including TCPA actions. Swigart Decl., ¶¶ 41-47; Kazerounian Decl., ¶¶ 41-54;  
20 Friedman Decl., ¶¶ 41-45. Plaintiff’s counsel are qualified and able to conduct this  
21 Litigation. Kazerounian Decl., ¶¶ 41-54; Swigart Decl., ¶¶ 41-47; Friedman Decl.,  
22 ¶¶ 41-45. Thus, Rule 23(a)(4) is satisfied.

23                   **5.     COMMON QUESTIONS PREDOMINATE SUFFICIENT TO CERTIFY**  
24                   **A CLASS FOR SETTLEMENT PURPOSES ONLY**

25           Class certification under Rule 23(b)(3) is appropriate where “questions of  
26 law or fact common to class members predominate over any questions affecting  
27 only individual members.” Fed. R. Civ. P. 23(b)(3). The inquiry focuses on  
28 whether the class is “sufficiently cohesive to warrant adjudication by  
representation.” *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las*

1 *Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). Central to this question is  
 2 “the notion that the adjudication of common issues will help achieve judicial  
 3 economy.” *Zincser v. Accufix Research Institute, Inc.*, 253 F.3d 1188, 1189 (9th  
 4 Cir. 2001) (citation omitted), amended, 273 F. 3d 1266 (9th Cir. 2001).

5 Here, the central inquiry is whether Comenity Bank violated the TCPA with  
 6 automated and/or prerecorded debt collection calls made to Class Members’ cell  
 7 phones without consent. Compl., ¶¶ 9-16. *See Malta*, 2013 U.S. Dist. LEXIS  
 8 15731 at \*10 (“The central inquiry is whether Wells Fargo violated the TCPA by  
 9 making calls to the class members. Accordingly, the predominance requirement is  
 10 met.”). Consent is not an issue because Defendant eliminated calls to cell phone  
 11 numbers that had been provided on customer applications. *See Gervais Depo.*,  
 12 85:1-25; 86:8-87:13. Further, considerations of judicial economy favor litigating a  
 13 predominant common issue once in a class action instead of thousands of times in  
 14 separate lawsuits. Thus, class certification in this lawsuit would be appropriate.  
 15 “When common questions present a significant aspect of the case and they can be  
 16 resolved for all members of the class in a single adjudication, there is clear  
 17 justification for handling the dispute on a representative rather than on an  
 18 individual basis.” *Hanlon*, 150 F.3d at 1022.

19 **6. CLASS TREATMENT FOR SETTLEMENT PURPOSES IS SUPERIOR**  
 20 **TO INDIVIDUAL RESOLUTIONS OF MILLIONS OF LAWSUITS**

21 To determine whether the superiority requirements of Rule 23(b)(3) are  
 22 satisfied, a court must compare a class action with alternative methods for  
 23 adjudicating the parties’ claims. Lack of a viable alternative to a class action  
 24 necessarily means that a class action satisfies the superiority requirement. “[I]f a  
 25 comparable evaluation of other procedures reveals no other realistic possibilities,  
 26 [the] superiority portion of Rule 23(b)(3) has been satisfied.” *Culinary/Bartenders*  
 27 *Trust Fund*, 244 F.3d at 1163. *See also, Valentino v. Carter-Wallace*, 97 F.3d  
 28 1227, 1235-36 (9th Cir. 1996) (“a class action is a superior method for managing  
 litigation if no realistic alternative exists”).

1 Consideration of the factors listed in Rule 23(b)(3) supports the conclusion  
 2 that, for purposes of a settlement class, certification is appropriate. Ordinarily,  
 3 these factors are (A) the interest of members of the class in individually controlling  
 4 the prosecution or defense of separate actions; (B) the extent and nature of any  
 5 litigation concerning the controversy already commenced by or against members  
 6 of the class; (C) the desirability or undesirability of concentrating the litigation of  
 7 the claims in the particular forum; and (D) the difficulties likely to be encountered  
 8 in the management of a class action. Fed. R. Civ. P. 23(b)(3).

9 However, when a court reviews a class action settlement, the fourth factor  
 10 does not apply. In deciding whether to certify a settlement class action, a district  
 11 court “need not inquire whether the case, if tried, would present intractable  
 12 management problems.” *Amchem Prods. Inc. v. Woodward*, 521 U.S. 591, 620  
 13 (1997). “With the settlement in hand, the desirability of concentrating the litigation  
 14 in one forum is obvious . . . .” *Elkins v. Equitable Life Ins. of Iowa*, No. Civ A96-  
 15 296-Civ-T-17B, 1998 WL 133741, at \*20 (M.D. Fla. Jan. 27, 1998); *see also*  
 16 *Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697 (M.D. Fla. 2005)  
 17 (Rule 23(b)(3)(C) and (D) factors are “conceptually irrelevant in the context of  
 18 settlement”) (citation omitted).

19 Here, the Rule 23(b)(3)(A), (B) and (C) factors all favor class certification:

20 (i) Any class member who wishes to pursue a separate action can opt out  
 21 of the Settlement (Agr. § 12.01);

22 (ii) The Parties are unaware of any competing litigation regarding the  
 23 claims at issue, apart from the *Picchi v. World Financial Network Bank, et al.*  
 24 action that is taken into consideration in defining the class definition in this Action  
 25 to exclude persons who were called by Comenity Bank where their telephone  
 26 number was marked as a “wrong number” (Agr. §2.08; *see also* Gervais Depo.,  
 27 79:1-24);

28 (iii) The Parties agree that it would be desirable to resolve Plaintiff’s



1 claims in this forum (Agr. § 3.01-3.03); and

2 (iv) It is unlikely that individual actions will be filed because of the small  
3 individual claims of Class Members, *Barani v. Wells Fargo Bank, N.A.*, 2014 U.S.  
4 Dist. LEXIS 49838, \*9 (S.D. Cal. Apr. 9, 2014).

5 **7. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE**

6 Rule 23(c)(2)(B) provides that, in any case certified under Rule 23(b)(3), the  
7 court must direct to class members the “best notice practicable” under the  
8 circumstances. Rule 23(c)(2)(B) does not require “actual notice” or that a notice  
9 be “actually received.” *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).  
10 Notice need only be given in a manner “reasonably calculated, under all the  
11 circumstances, to apprise interested parties of the pendency of the action and afford  
12 them an opportunity to present their objections.” *Mullane v. Central Hanover*  
13 *Bank & Trust Co.*, 339 U.S. 306, 314 (1950). “Adequate notice is critical to court  
14 approval of a class settlement under Rule 23(e).” *Hanlon*, 150 F.3d at 1025.

15 Pursuant to Fed. R. Civ. P. 23(e)(1)(B), “[t]he court must direct notice in a  
16 reasonable manner to all class members who would be bound by the proposal”.  
17 Rule 23(c)(2)(B) also sets forth requirements as to the content of the notice. The  
18 notice must concisely and clearly state in plain, easily understood language: (i) the  
19 nature of the action; (ii) the definition of the class; (iii) the class claims, issues, or  
20 defenses; (iv) that class member may enter an appearance through counsel if the  
21 member so desires; (v) that the court will exclude from the class any member who  
22 requests exclusion, stating when and how members may elect to be excluded; (vi)  
23 the time and manner for requesting exclusion; and (vii) the binding effect of a class  
24 judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

25 Here, the Direct Mail Notice, the Q & A Notice to be posted on the  
26 Settlement Website and the publication notice meet all the requirements.

27 ///

28 ///

1                                    **i.        *Direct Mail Notice***

2            The Claims Administrator will mail individual class notices via first-class  
3 mail in postcard-style form (“Direct Mail Notice”) with a unique Claim  
4 Identification Number to the approximately 4.3 million Settlement Class Members  
5 (Agr. § 2.21, 5.05, 8.02, 9.01; Exhibit A; *see* Kazerounian Decl., ¶ 32). This initial  
6 mailing of the Direct Mail Notice shall occur within 30 days after entry of the  
7 Preliminary Approval Order. Agr. § 9.01. The notice procedure also permits  
8 searches of the U.S. Post Office National Change of Address Database by the  
9 Claims Administrator to obtain current addresses before mailing and for any  
10 notices returned by the postal service. *Id.* at § 9.02. If the Direct Mail Notice sent  
11 to any person is returned as undeliverable, and if a new address is obtained for  
12 such a person, a second Direct Mail Notice shall be mailed to the new address. *Id.*

13                                   **ii.        *Q & A Notice On Settlement Website***

14            In addition, the Parties have agreed to provide notice through the detailed Q  
15 & A Notice that will be posted on the Settlement Website maintained by the  
16 Claims Administrator. *Id.* at §§ 9.04-9.05. The Settlement Website will allow  
17 visitors to access (and print) a complete copy of the Direct Mail Notice, the  
18 Settlement Agreement, and the Q & A Notice. *Id.* at § 9.05. The website will also  
19 allow them to file claims online if they provide the necessary identifying  
20 information as set forth in the Notice, i.e., their Claim Identification Number. *Id.*  
21 *see also* Kazerounian Decl., ¶ 33.

22            Also, the notices will be disseminated and posted on the website sufficiently  
23 prior to the Final Approval hearing to give Class members the opportunity to  
24 comment on the settlement, or to opt out and preserve their rights. *Id.* *See Torrissi v.*  
25 *Tucson Electric Power Co.*, 8 F.3d 1370, 1374-1375 (9th Cir. 1993) (31 days is  
26 more than sufficient, as Class as a whole had notice adequate to flush out whatever  
27 objections might reasonably be related to the settlement) *citing Marshall v. Holiday*  
28 *Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (approving timing of a notice



1 which was mailed 26 days before the deadline for opting out of a settlement).

2 **iii. Publication Notice**

3 “No later than thirty (30) days after entry of the Preliminary Approval  
4 Order, or as soon as practicable thereafter, the Claims Administrator shall cause a  
5 Publication Notice, substantially in the form attached hereto as Exhibit B, to be  
6 published once on a nationwide basis, in a national edition of USA Today on any  
7 day from Monday through Thursday, and to be published on the Settlement  
8 Website on the same date, and retained on the website thereafter.” Agr. § 9.03.

9 **iv. Toll-Free Number**

10 Anyone can obtain information about the Settlement through the Toll-Free  
11 Telephone Number. *Id.* at 9.06. The Claims Administrator shall maintain a Toll-  
12 Free Number throughout the ninety (90) day Claims Period and beyond, which will  
13 allow callers to request copies of the Direct Mail Notice and the Settlement  
14 Agreement. *See* Kazerounian Decl., ¶ 18. Class Members may not file claims by  
15 calling that toll, but they may obtain information about how to submit a claim by  
16 calling the toll-free number.

17 Accordingly, the Direct Mail Notice, the longer Q & A Notice posted on the  
18 Settlement Website, the publication notice and the press release fulfills all  
19 requirements of adequate notice and should be duly approved. *Torrissi*, 8 F.3d  
20 1370, 1374-35; *Malta*, 2013 U.S. Dist. LEXIS 15731 at \*29-30; Fed. R. Civ. P.  
21 23(c)(2); Manual, 3d. 30.21.

22 **v. Notice Database**

23 Pursuant to the proposed Settlement, Comenity Bank has agreed to provide a  
24 Notice Database to the Claims Administrator and to Class Counsel. Agr. §§ 2.21  
25 and 8.02. The Notice Database is a database containing the names, current or last  
26 known mailing addresses, account numbers and cell phone numbers called that are  
27 contained in Comenity Bank’s records pertaining to approximately 4.3 million  
28 Class Members (Agr. § 8.02). *See* Kazerounian Decl., ¶¶ 10-12. Defendant has

1 already compiled the Class list. Gervais Depo., 88:4-12.

2 To create the Notice Database, according to representations made  
3 throughout the action and in more detail in confirmatory discovery, Comenity  
4 Bank reviewed its records of calls made to all persons using the dialer and  
5 scrubbed the list for cell phones only during the period of September 2012 through  
6 May 26, 2014. *See* Kazerounian Decl., ¶¶ 10-11. For the period of August 1, 2010  
7 through September 2012, Defendant did not have call data from the dialer, and so  
8 Defendant had to query collection activity tables to obtain the number of phone  
9 calls using proprietary software, and then ran a search for delinquent accounts  
10 during that period to determine the telephone numbers that were likely sent to the  
11 dialer based on Comenity Bank's policies and procedures. *See* Gervais Depo.,  
12 73:9-76:21; 76:7-25. By narrowing the time periods to the respective Class  
13 Periods, Comenity Bank identified the cell phones called and used those numbers  
14 to produce the Notice Database. *See Id.* at 80:7-82:15; 79:18-24. The Notice  
15 Database will be utilized by the Claims Administrator to provide notice to the  
16 Class Members. Agr. § 8.02. Not less than fourteen (14) days prior to the Fairness  
17 Hearing, the Claims Administrator shall file a declaration certifying that Notice has  
18 been properly given, and list the number of persons that request exclusion from the  
19 Settlement. *Id.* at § 13.01.

20 This notice program is designed to meaningfully reach the largest possible  
21 number of Class Members, despite its expense. Courts have approved settlements  
22 in which notice was calculated to reach 75-83% of the class<sup>8</sup> and 70% of the class,<sup>9</sup>  
23 respectively. The Direct Mail Notice is calculated to reach every member of the  
24

25 <sup>8</sup> *Hartless v. Clorox Co.*, 2011 U.S. Dist. LEXIS 5427, at \*25 (S.D. Cal. Jan. 20,  
26 2011) (court granted final approval of settlement where notice was estimated to reach  
75-83% of the class).

27 <sup>9</sup> *Wilson v. Airborne, Inc.*, 2008 U.S. Dist. LEXIS 110411, at \*13-14 (C.D. Cal. Aug.  
28 13, 2008) (court granted final approval of settlement where measurements used to  
estimate notice reach suggested that 80% of adults learned of the settlement).

1 Settlement Class Members identified in the Notice Database by Direct Mail  
2 Notice. It will almost certainly reach more than the 70% to 80% threshold found to  
3 be sufficient in the aforementioned cases. The Direct Mail Notice, combined with  
4 the posting of the Q & A Notice on the website, and the publication Notice  
5 satisfies the requirements of due process, is the best notice practicable under the  
6 circumstances, and constitutes due and sufficient notice.

7 **8. THE COURT SHOULD APPOINT THE CLASS REPRESENTATIVE**  
8 **AND CLASS COUNSEL**

9 “[T]wo criteria for determining the adequacy of representation have been  
10 recognized. First, the named representatives must appear able to prosecute the  
11 action vigorously through qualified counsel, and second, the representatives must  
12 not have antagonistic or conflicting interests with the unnamed members of the  
13 class.” *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

14 In this case, the adequacy of representation requirement is satisfied. For  
15 settlement purposes, the Parties jointly request that the Plaintiff, Carrie Couser, be  
16 appointed as the Class Representative. The Parties have agreed that Joshua B  
17 Swigart of Hyde & Swigart, Abbas Kazerounian of the Kazerouni Law Group,  
18 A.P.C., and Todd M. Friedman of the Law Offices of Todd M. Friedman, should  
19 be appointed as Class Counsel for Plaintiff Couser and for all other purposes of the  
20 Settlement. Agr. § 4.01. Plaintiff’s counsel all have extensive experience  
21 sufficient to be appointed as Class Counsel here. Swigart Decl., ¶¶ 41-47;  
22 Kazerounian Decl., ¶¶ 41-56; Friedman Decl., ¶¶ 41-45. Plaintiff Couser  
23 understands the obligations of serving as class representatives, has adequately  
24 represented the interests of the putative class, and has retained experienced  
25 counsel. Swigart Decl., ¶ 41-47; Kazerounian Decl., ¶ 41-56; Couser Decl., ¶¶ 5-6.  
26 Plaintiff has no antagonistic or conflicting interests with the Class Members.  
27 Swigart Decl., ¶ 34; Kazerounian Decl., ¶ 34; Couser Decl., ¶ 8. Plaintiff and the  
28 Class Members seek the same relief, which includes statutory damages for  
Defendant’s alleged unlawful actions as well as injunctive relief. Considering the

overwhelming similarity of claims, there is no potential for conflicting interests.

**9. KCC SHOULD BE APPOINTED CLAIMS ADMINISTRATOR**

The Parties have agreed upon and propose that the Court appoint KCC to serve as the Claims Administrator. Agr. §§ 2.07 and 8.01. KCC specializes in providing administrative services in class action litigation and has extensive experience in administering consumer protection and privacy class action settlements. *See* Passarella Decl., ¶¶ 3-4; Exhibit A thereto. KCC has been approved in similar TCPA class action settlement. *See Knutson v. Schwan's Home Serv.*, 2014 U.S. Dist. LEXIS 99637, \*13 (S.D. Cal. July 14, 2014).

**10. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

The last step in the settlement approval process is the formal Final Approval Hearing or Fairness Hearing, at which time the Court may hear all evidence and argument, both for and against, the Settlement in order to evaluate its merits and determine whether it should be approved. Plaintiff requests that the hearing be held not before 144 days after the date of entry of the Preliminary Approval Order to allow sufficient time for providing CAFA Notice<sup>10</sup>, direct mail notice and the 75-day claims period (Agr. § 2.06).

**VI. CONCLUSION**

For all the foregoing reasons, Plaintiff respectfully requests that the Court enter an order preliminarily approving the proposed Settlement, appointing Carrier Couser as Class Representative, and appointing Abbas Kazerounian, Joshua B. Swigart and Todd M. Friedman Class Counsel.

Dated: September 5, 2014

Respectfully submitted,  
**KAZEROUNI LAW GROUP, APC**

By: /s Abbas Kazerounian  
ABBAS KAZEROUNIAN, ESQ.  
ATTORNEY FOR PLAINTIFF

<sup>10</sup> KCC, on behalf of Defendant, will provide the required CAFA Notice (Agr. § 2.04) pursuant to 28 U.S.C. § 1715 within ten days of this motion. Agr. § 9.07.

**HYDE & SWIGART**

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